FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y
★ 9 ★
BROOKLYN OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--X

LORRAINE DAMATO, LOUIS MCLAUGHLIN, KATHLEEN MCNALLY, MICHAEL NASOFF, DIANA MANWARING, NATALIE LENETT, BLEU MARAQUIN, CHRIS YOOSEFI, GABRIEL BROOKS, and ANGEL NIEVES, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

TIME WARNER CABLE, INC.,

Defendant.

--X

13-CV-994 (ARR) (VMS)

OPINION AND ORDER

NOT FOR ELECTRONIC OR PRINT PUBLICATION

ROSS, United States District Judge:

In February 2013, plaintiffs, customers of defendant Time Warner Cable, Inc. ("Time Warner" or "TWC"), brought this putative class action seeking damages, restitution, and declaratory and injunctive relief. Plaintiffs' claims stem from Time Warner's practice of charging customers a monthly "Modem Lease Fee." Plaintiffs allege that this fee violates their contractual agreement with Time Warner and its duty of good faith and fair dealing, constitutes unjust enrichment, and violates New York, New Jersey, and California consumer protection statutes. I previously granted Time Warner's motion to stay this action pending arbitration of plaintiffs' claims for monetary damages pursuant to a binding arbitration clause in plaintiffs' agreements with Time Warner. After plaintiffs' damages claims were arbitrated and the arbitral awards were confirmed, plaintiffs filed an amended complaint seeking only restitution and declaratory and injunctive relief. Time Warner now moves to dismiss plaintiffs' amended complaint. For the reasons that follow, Time Warner's motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to October 2012, Time Warner provided internet modems to its customers at no additional cost as part of the customers' monthly service plans. Am. Compl., Dkt. # 59, ¶ 1. In October 2012, Time Warner began charging its customers a fee to lease these modems ("the Modem Lease Fee" or "the Fee"). Id. From this fee, which was originally $3.95 per month and has since increased to $10 per month, Time Warner recoups nearly one billion dollars each year. Id. ¶¶ 2, 34.

Plaintiffs filed this putative class action on February 25, 2013, seeking monetary damages, restitution, and declaratory and injunctive relief. Compl., Dkt. #1, ¶ 19. Plaintiffs alleged that the Modem Lease Fee breached the Residential Services Subscriber Agreement ("the Agreement") between Time Warner and its customers and the Agreement's implied duty of good faith and fair dealing. Id. ¶¶ 112-43. Plaintiffs also alleged unjust enrichment and violations of New York, New Jersey, and California consumer protection statutes. Id. ¶¶ 144-84.

On June 27, 2013, Time Warner moved to compel arbitration of plaintiffs' claims for monetary damages pursuant to a binding arbitration clause in the Agreement. See Mem. of Law in Supp. of Def.'s Mot. to Stay or Dismiss this Action Pending Arbitration, Dkt. #14. The Agreement states, in relevant part:

> **15. Unless you Opt Out, You are Agreeing to Resolve Certain Disputes Through Arbitration**
>
> (a) Our goal is to resolve Disputes fairly and quickly. However, if we cannot resolve a Dispute with you, then, except as described elsewhere in Section 15, each of us agrees to submit the Dispute to the American Arbitration Association for resolution. . . .
>
> (b) You may bring claims only on your own behalf, and not on behalf of any official or other person, or any class of people. Only claims for money damages may be submitted to arbitration; claims for injunctive orders or similar relief must be brought in a court. You may not combine a claim that is subject to arbitration under

> this Agreement with a claim that is not eligible for arbitration under this Agreement. . . .
>
> **16. Definitions**
>
> [. . . .]
>
> (e) Dispute[] means any dispute, claim, or controversy between you and TWC regarding any aspect of your relationship with us, including those based on events that occurred prior to the date of this Agreement.

Residential Services Subscriber Agreement ("Agreement"), Am. Compl. Ex. A, Dkt. #59-1, ¶¶ 15-16.

On July 31, 2013, I issued an opinion granting Time Warner's motion and compelling arbitration of "plaintiffs' claims for money damages." Damato v. Time Warner Cable, Inc. ("Damato I"), No. 13-cv-994, 2013 WL 3968765, at *13 (E.D.N.Y. July 31, 2013), Dkt. #20. The opinion interpreted the key language of the Agreement's arbitration clause — that "[o]nly claims for money damages may be submitted to arbitration; claims for injunctive orders or similar relief must be brought in a court," Agreement ¶ 15(b) — as requiring arbitration of claims for money damages and prohibiting arbitration of claims for injunctive or similar relief. See Damato I, 2013 WL 3968765, at *12-13. Accordingly, as required by the Federal Arbitration Act, 9 U.S.C. § 3, I stayed the action pending arbitration of plaintiffs' damages claims. Id. at *13.

Plaintiffs then proceeded to arbitration on their damages claims. See Arbitration Awards, Decl. of Peter J. Linken Exs. 1-7, Dkt. #41-3; Arbitration Awards, Decl. of Steven L. Wittels Exs. A-B, Dkt. #53-1, #53-2 (collectively, "Arbitration Awards"). In seven of the individual arbitrations,[1] Time Warner prevailed on all claims presented. In two others,[2] however, plaintiffs McLaughlin and Manwaring each prevailed on their breach of contract claim, receiving awards of $1,936.39 and $27.65, respectively; Time Warner prevailed on the remaining claims. All nine arbitral awards were judicially reviewed and confirmed. Op. & Order (Apr. 7, 2016), Dkt. #45; Op. & Order (July 13, 2016), Dkt. #56. The confirmation orders dismissed the damages claims plaintiffs had lost in arbitration, confirmed McLaughlin's and Manwaring's awards of $1,936.39 and $27.65 on their breach of contract claims, and expressly reserved for later resolution the question whether plaintiffs who had lost in arbitration were "proper parties to the suit for the purpose of pursuing equitable relief." Op. & Order (July 13, 2016), Dkt. #56, at 4; see also Op. & Order (Apr. 7, 2016), Dkt. #45.

Plaintiffs then filed an amended complaint ("the FAC") alleging four principal claims. Am. Compl., Dkt. #59. First, they allege breach of contract, asserting that the Modem Lease Fee violated various provisions of the Agreement, including: ¶ 3(a), which authorizes Time Warner to require customers to lease "new or additional" equipment; a separate provision of ¶ 3(a) that "assure[s]" customers who enrolled in a set price plan that they will be charged only the set price for the duration of the plan; and ¶ 5(g), which states that Time Warner will "provide" a modem to its customers. Id. ¶¶ 40-47; 56-61; 91-96, 102-07, 113-16. Second, plaintiffs allege that, independently of the Agreement's express terms, Time Warner's imposition of the Fee breached its implied contractual duty of good faith and fair dealing. Id. ¶¶ 97-100. Third, each plaintiff claims that the imposition of the Fee violates his or her rights under New York, New Jersey, or

---

[1] Arbitration Awards, Decl. of Peter J. Linken, Dkt. #41, Ex. 1 ("Damato Award"), Ex. 2 ("Maraquin Award"), Ex. 3 ("Brooks Award"), Ex. 4 ("Lenett Award"), Ex. 5 ("McNally Award"), Ex. 6 ("Yoosefi Award"), Ex. 7 ("Nasoff Award").

[2] Arbitration Awards, Decl. of Steven L. Wittels Ex. A, Dkt. #53-1 ("McLaughlin Award"); id. Ex. B, Dkt. #53-2 ("Manwaring Award").

California consumer protection statutes. Id. ¶¶ 117-50. Finally, plaintiffs allege that Time Warner was unjustly enriched by the Fee at plaintiffs' expense. Id. ¶¶ 108-12.

Each of the nine individual plaintiffs who originally brought suit remains as a plaintiff in the FAC. The amended complaint also adds a new plaintiff, Angel Nieves, who has not arbitrated any claims. See id. ¶ 11. Plaintiffs continue to assert their claims individually and on behalf of a putative class of all Time Warner customers who were charged the Modem Lease Fee as well as various putative subclasses, including residents of New York, New Jersey, and California who were charged the Fee in violation of relevant consumer protection laws. Id. ¶¶ 22-31, 66-73. With respect to each claim asserted in the FAC, plaintiffs seek only equitable relief — specifically, declaratory and injunctive[3] relief on all claims,[4] id. ¶¶ 82-90, 101, 107, 116, 124, 131, 139, and restitutionary relief on their unjust enrichment and consumer protection claims only, id. ¶¶ 112, 124, 131, 150.

Before the court is Time Warner's motion to dismiss plaintiffs' amended complaint under Federal Rule of Civil Procedure Rule 12(b)(6), which plaintiffs oppose. See Mem. of Law in Supp. of Def.'s Mot. to Dismiss the First Am. Compl. ("Def.'s Mot."), Dkt. #61; Pls.' Mem. of Law in Opp'n to Def.'s Mot. to Dismiss ("Pls.' Opp'n"), Dkt. #64.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) requires that a complaint "contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "In ruling on a Rule 12(b)(6) motion, [the court] accept[s] the allegations contained in the complaint as true and draw[s] all reasonable inferences in favor of the nonmoving party." Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 776 (2d Cir. 2002); Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc., 343 F.3d 189, 194 (2d Cir. 2003). "In considering a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference." Kramer v. Time Warner Inc., 937 F.2d 767, 773 (2d Cir. 1991).[5]

---

[3] In response to defendant's repeated argument that an injunction is a remedy rather than a cause of action, plaintiffs withdrew substantive Count II (titled "Injunction"), Pls.' Opp'n at 20 n.12, but continue to seek an injunction as a remedy for each of their claims, see id. at 28.

[4] Except, plaintiffs do not seek declaratory relief under California's consumer protection statutes. Am. Compl. ¶¶ 139, 150.

DISCUSSION

Time Warner's attack on the amended complaint is twofold. First, Time Warner seeks dismissal of virtually every substantive claim alleged — including express and implied breach of contract and violation of state consumer protection statutes — on the ground that the confirmed arbitral dismissals of plaintiffs' damages claims preclude relitigation of the merits of their substantive claims in this court, where plaintiffs now seek equitable relief.[6] Time Warner separately attacks each equitable remedy plaintiffs seek, urging that the allegations in the FAC cannot support plaintiffs' requests for declaratory or injunctive relief as to any individual plaintiff, nor can they support a request for restitutionary relief predicated on a claim of unjust enrichment. As addressed below, each of Time Warner's arguments must be rejected as premature at this stage of the litigation.

---

[5] As discussed below, the arbitral awards may also be considered at this stage for the purpose of determining the preclusive effect of those awards. See infra at 13.

[6] There are two exceptions. First, because plaintiffs' unjust enrichment claims were not arbitrated, Time Warner does not seek dismissal of these claims on preclusion grounds. See Def.'s Mot. at 4. Second, Time Warner concedes that plaintiffs Manwaring and McLaughlin, who prevailed on their breach of contract claims in arbitration, may attempt to secure equitable relief on those claims in this proceeding. See Reply Mem. of Law in Further Supp. of Def.'s Mot. to Dismiss the First Am. Compl. ("Def.'s Reply"), Dkt. #65, at 15 n.9.

I. Time Warner's Preclusion Arguments

Time Warner advances two arguments in support of its contention that plaintiffs are precluded from litigating their substantive claims before this court. First, without citation to legal authority or even identification of any supporting legal doctrine, Time Warner puts forth the simple proposition that plaintiffs' losses in arbitration ipso facto bar the substantive claims alleged in the FAC. Second, Time Warner argues in the alternative that plaintiffs' arbitral losses collaterally estop them from relitigating the issues decided against them in arbitration. As explained below, the first argument is in fact a disguised invocation of the doctrine of res judicata, the application of which is legally untenable here. The second argument is similarly unavailing. Collateral estoppel does not afford Time Warner the result it seeks as there exists no record before this court supporting dismissal of the complaint on this ground.

A. Plaintiffs' Claims Are Not Precluded by Res Judicata.

The April and June 2016 orders confirmed the arbitration awards and dismissed with prejudice plaintiffs' breach of contract, breach of duty of good faith and fair dealing, and state consumer protection claims asserted in arbitration. Op. & Order (Apr. 7, 2016), Dkt. #45; Op. & Order (July 13, 2016), Dkt. #56. The amended complaint alleges claims under these same causes of action, but plaintiffs now seek equitable relief, which was not available to them in arbitration.

Time Warner argues that plaintiffs' breach of contract, breach of duty of good faith and fair dealing, and state consumer protection claims must be dismissed because these same claims were dismissed with prejudice in the orders that confirmed the arbitral awards in Time Warner's favor. Time Warner offers a plethora of formulations of this argument, repeatedly interposing it as a bar to each substantive claim in the FAC. For example, Time Warner contends that plaintiffs' complaint "impermissibly plead[s] claims that were adjudicated during the arbitration process and should be dismissed," Def.'s Mot. at 1, that plaintiffs "have no bases upon which to plead [these] claims in the FAC since such claims were resolved previously in arbitration and . . . dismissed with prejudice by this Court," id. at 9, that "[p]laintiffs now seek to re-assert identical causes of action under the guise of seeking injunctive relief," id. at 10, and that "the factual and legal theories underlying [p]laintiffs' . . . claims have already been litigated through contractually-mandated arbitrations and were found to be without merit [so t]he court should reaffirm its previous dismissal with prejudice of these claims," id.[7]

Preliminarily, Time Warner's first preclusion argument — that the court's prior orders enforcing the arbitral awards foreclose plaintiffs' claims — is wholly belied by the language of the April and June 2016 orders, as mandated by the terms of the parties' arbitration agreement. As discussed above, the arbitration agreement required arbitration of all claims for money damages, and prohibited arbitration of claims for equitable relief, providing that such claims could be pursued only in a court of law. Damato I, 2013 WL 3968765, at *8, *13. In conformity with that mandate, the orders carefully cabined the confirmation awards to plaintiffs' claims for money damages. They dismissed only those claims that plaintiffs had lost in arbitration proceedings — that is, plaintiffs' claims for money damages for breach of contract (for seven plaintiffs), breach of duty of good faith and fair dealing (for nine plaintiffs), and state consumer protection laws (for nine plaintiffs). Op. & Order (Apr. 7, 2016), Dkt. #45; Op. & Order (July 13, 2016), Dkt. #56. By their terms, the orders provided that "[a]ll claims against defendant for monetary damages that were submitted to arbitration [on which Time Warner prevailed] . . . are hereby dismissed with prejudice." Op. & Order (Apr. 7, 2016), Dkt. #45, at 3. Such unambiguous language, conforming precisely to the scope of arbitration provided by the Agreement, cannot be interpreted to implicitly dismiss plaintiffs' claims for equitable relief, a result prohibited by the arbitration agreement the orders were issued to enforce.

---

[7] Time Warner offers even more formulations of this argument, for example that: it is "improper" for "plaintiffs[to] attempt to resurrect claims against TWC that were adjudicated by nine separate arbitrators," Def.'s Mot. at 1; plaintiffs' claims have previously been dismissed, id. at 13; "[p]laintiffs cannot relitigate those claims under the guise of seeking equitable relief based entirely on facts identical to those already considered by the arbitrators," Def.'s Reply at 1; "all nine arbitrators already found that TWC was not liable . . . and the arbitration orders dismissing those claims have been confirmed by the court," id. at 8; and "the Court should now dismiss [these] claims since there is no reason to deviate from the prior findings with regard to liability as rendered by [the] arbitrators and confirmed by the Court," id. at 15.

Moreover, the July 2016 order explicitly rejected any suggestion that the confirmation awards were intended even to address, much less resolve, the issue of whether dismissal of plaintiffs' damages claims would have any preclusive effect on their equitable claims. Specifically, in confirming the Manwaring and McLaughlin awards, I denied what I interpreted as Time Warner's request that I clarify that the seven plaintiffs who did not prevail on their damages claims in arbitration were no longer parties to this suit for the purpose of pursuing equitable relief. Op. & Order (July 13, 2016), Dkt. #56, at 4. Precisely because the issue of preclusion was not yet ripe for consideration, I invited Time Warner to raise the argument at a later phase of the proceeding, when plaintiffs' claims for equitable relief were adjudicated. Id.

Beyond relying on a misreading of the confirmation orders, Time Warner's first ground for preclusion is simply an argument that plaintiffs are barred from relitigating their claims for breach of contract, breach of duty of good faith and fair dealing, and state consumer protection violations because the same claims were litigated and lost in arbitration. Although Time Warner identifies no principle of law supporting that assertion, it is in fact seeking to invoke the doctrine of res judicata, which bars "a party to a lawsuit from litigating a claim more than once." Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F.3d 343, 345 (2d Cir. 1995). In the circumstances of this case, however, the doctrine of res judicata does not bar plaintiffs' claims. This is so because an element essential to the application of the doctrine of res judicata is lacking — specifically, that the remedy sought must have been available in the previous action.

Traditionally, the doctrine of res judicata, or claim preclusion, "refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim."[8] New Hampshire v. Maine, 532 U.S. 742, 748 (2001). More specifically, the doctrine provides that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.5 (1979). As illustrated by the above quotations from its briefs, Time Warner's first preclusion argument appears to rely solely on this doctrine: Time Warner argues in substance that because plaintiffs' claims were resolved in arbitration and dismissed with prejudice by the court, plaintiffs are barred from asserting those same causes of action in this suit.

Assuming arguendo that the prior arbitration awards constituted a prior judgment on the merits, however, res judicata is inapplicable here. "Th[e] bar against later claims based upon the same cause of action is . . . subject to certain limitations, one of which is that it will not be applied if the initial forum did not have the power to award the full measure of relief sought in the later litigation." Davidson v. Capuano, 792 F.2d 275, 278 (2d Cir. 1986); accord Restatement (Second) of Judgments § 26(1)(c) (1982). Accordingly, when a plaintiff is prevented from recovering a particular remedy in an initial proceeding "by formal jurisdictional or statutory barriers, not by plaintiff's choice," res judicata cannot apply in a subsequent proceeding where the plaintiff seeks that same remedy. Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). Based on this limitation, numerous decisions have found res judicata inapplicable to claims seeking relief that was unavailable in the first proceeding. See, e.g., id. (holding that prior state habeas proceeding where damages were unavailable did not bar identical claim for damages under § 1983); Antonsen v. Ward, 943 F.2d 198, 201 (2d Cir.1991) (prior New York State Article 78 proceeding where damages were unavailable did not bar § 1983 claim for compensatory damages); Davidson, 792 F.2d at 278 (same); United States v. Katz, No. 10-cv-3335, 2011 WL 2175787, at *7 (S.D.N.Y. June 2, 2011) (prior housing court decision did not bar United States from seeking equitable relief and civil penalties that were not available in the prior action); Khal Charidim Kiryas Joel v. Vill. of Kiryas Joel, 935 F. Supp. 450, 456 (S.D.N.Y. 1996) (finding that prior state court decision regarding injunctive relief did not bar "plaintiffs' claims for damages, since this remedy was not fully available in the state court proceedings").

---

[8] Usually res judicata involves "two separate lawsuits": the doctrine bars a plaintiff from bringing a second lawsuit based on a claim that was raised or could have been raised in a previous suit. See 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4401 (2d ed. 2016). However, the Second Circuit has taken a broader approach to the doctrine, and has applied it to bar a plaintiff from re-pleading a claim that has previously been dismissed with prejudice within the same lawsuit. See, e.g., Day v. Moscow, 955 F.2d 807, 811 (2d Cir. 1992) (affirming, based on "[p]rinciples of res judicata," dismissal of portions of plaintiff's amended complaint that duplicated claims that had previously been asserted and dismissed in the action); see also L-Tec Elecs. Corp. v. Cougar Elec. Org., Inc., 198 F.3d 85, 88 (2d Cir. 1999) (per curiam) (affirming, on grounds of res judicata, dismissal of plaintiff's amended complaint, which was filed after summary judgment was entered for defendant). Thus, I apply res judicata here.

The only other legal doctrine Time Warner might invoke is the discretionary doctrine of law of the case, which provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Pepper v. United States, 562 U.S. 476, 506 (2011) (quoting Arizona v. California, 460 U.S. 605, 618 (1983)). "It is generally accepted that the law of the case doctrine does not limit the power of a court, but 'merely expresses the practice of courts generally to refuse to reopen what has been decided.'" N. River Ins. Co. v. Phila. Reinsurance Corp., 63 F.3d 160, 164 (2d Cir. 1995) (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988)). Because, as explained in the main text, the April and July 2016 orders did not resolve any preclusion issues, law of the case would not bar plaintiffs' claims.

In the instant case, the arbitration clause in the Agreement permits the parties to raise in arbitration only claims for monetary damages, and "clearly prohibits either side from arbitrating claims for injunctive or similar relief." Damato I, 2013 WL 3968765, at *8; see also Goshon v. I.C. Sys., Inc., No. 14-CV-2572, 2015 WL 6393901, at *3 (D. Kan. Oct. 21, 2015) (concluding that a Time Warner Subscriber Agreement identical to the one at issue in this case "excludes from arbitration any claims which seek 'injunctive orders or similar relief'"). The Agreement thus provided a formal jurisdictional barrier that prohibited plaintiffs from asserting, and the arbitrators from adjudicating, claims for equitable relief in arbitration. Accordingly, the confirmed arbitral decisions have no preclusive effect on plaintiffs' equitable claims based on the doctrine of res judicata.

B. At This Juncture, Time Warner Has Not Demonstrated That Collateral Estoppel Precludes Plaintiffs from Pursuing Claims They Lost in Arbitration.

Alternatively, Time Warner contends that the arbitral determinations finding Time Warner not liable as to plaintiffs' contractual and statutory claims collaterally estop plaintiffs from pursuing those claims in this proceeding. As neither Time Warner's explanations nor the limited record available on this motion support application of collateral estoppel to bar plaintiffs' claims, I cannot dismiss the claims on this basis at this early stage of the litigation.

The doctrine of collateral estoppel dictates that a "prior judgment . . . foreclose[s] successive litigation of an issue of fact or law actually litigated and resolved" in the prior action. New Hampshire, 532 U.S. at 748-49. For collateral estoppel to apply, the following four elements must be met: "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." Bear, Stearns & Co. v. 1109580 Ontario, Inc., 409 F.3d 87, 91-92 (2d Cir. 2005) (quoting Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 91 (2d Cir. 1997)).[9] Significantly here, collateral estoppel applies to factual and legal issues determined in arbitration

[9] I apply federal collateral estoppel law here because although "[i]t is not clear that federal law on collateral estoppel is controlling. . .[,] both parties cite[] federal law . . . as controlling precedent . . . and no one argues that the application of state law would have made a difference." Bear, Stearns & Co., 409 F.3d at 91 n.3.

and to those decided by a court of law with equal force. Rice v. Scudder Kemper Invs., Inc., No. 01-cv-7078, 2003 WL 21961010, at *5 (S.D.N.Y. Aug. 14, 2003) ("Collateral estoppel can be applied to issues without regard to whether the prior proceeding was an arbitration or before a court of law."), aff'd sub nom. Rice v. Wartsila NSD Power Dev., Inc., 183 F. App'x 147 (2d Cir. 2006); Bear, Stearns & Co., 409 F.3d at 91 (applying same legal standard for collateral estoppel to prior arbitration decision as applies to prior litigation); Jacobson v. Fireman's Fund Ins. Co., 111 F.3d 261, 267 (2d Cir. 1997) (holding that an arbitration award and a state court decision confirming an arbitration award have the same collateral estoppel effect).

"'The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment,' and 'issue preclusion will apply only if it is quite clear that this requirement has been met.'" Postlewaite v. McGraw-Hill, 333 F.3d 42, 49 (2d Cir. 2003) (alterations omitted) (quoting BBS Norwalk One, Inc. v. Raccolta, Inc., 117 F.3d 674, 677 (2d Cir. 1997)). At the motion to dismiss stage, collateral estoppel applies "where it is clear from the face of a complaint that a claim is barred by a prior judgment." Lobaito v. Fin. Indus. Regulatory Auth., Inc., No. 13-cv-6011, 2014 WL 4470423, at *12 (S.D.N.Y. Sept. 9, 2014) (citing Conopco, Inc. v. Roll Int'l, 231 F.3d 82, 86 (2d Cir. 2000)), aff'd, 599 F. App'x 400 (2d Cir. 2015). In assessing that issue, "a court is permitted to take judicial notice of and consider the complaints and the record generated in both [the prior and current] actions without having to convert the motion to dismiss into a summary judgment motion." Griffin v. Goldman, Sachs & Co., No. 08-cv-2992, 2008 WL 4386768, at *2 (S.D.N.Y. Sept. 23, 2008). Accordingly, I take judicial notice of the nine confirmed arbitral awards as well as the amended complaint and its attached exhibit.

On the record before me, Time Warner has not met its burden of showing "with clarity and certainty" that the issues raised in and decided by the arbitrations are "identical" to the issues raised here. Postlewaite, 333 F.3d at 49; Bear, Stearns & Co., 409 F.3d at 91; see also Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 400 (2d Cir. 2011) ("If the issues are not identical, there is no collateral estoppel." (alteration omitted) (quoting NLRB v. Thalbo Corp., 171 F.3d 102, 109 (2d Cir.1999))). Time Warner assumes, without record citation or any explanation, that the issues plaintiffs raised in arbitration are identical to those they raise in this litigation. Referring only in general, conclusory terms to plaintiffs' arbitration of an "alleged breach of the [Agreement]" and "alleged violations of consumer protection laws of [plaintiffs'] respective home states," Def.'s Mot. at 11-12, Time Warner summarily concludes that "the underlying factual and legal issues have already been adjudicated in arbitration," Def.'s Reply at 8. But in their amended complaint, plaintiffs offer numerous theories of Time Warner's liability for breach of contract and consumer protection violations, and Time Warner fails to explain whether some or all of the theories of liability that plaintiffs allege here were identically raised and decided in arbitration, and by which plaintiffs. In short, Time Warner has "failed to set out in any organized or systematic manner the issues that were determined by the prior judgments which they claim the . . . Plaintiffs should not be permitted to relitigate here." Bey v. City of New York, No. 01-cv-8906, 2010 WL 3910231, at *15 (S.D.N.Y. Sept. 21, 2010), aff'd, 454 F. App'x 1 (2d Cir. 2011).

Nor can I independently discern "with clarity and certainty" from the truncated record before me whether the issues Plaintiffs raise here are the precise issues they raised in arbitration, such that I could give preclusive effect to the arbitrators' determinations of liability. Postlewaite, 333 F.3d at 49. Almost half of the arbitration awards are brief and do not explain in detail either the claims raised by plaintiffs or the arbitrators' reasoning for their decisions. See McNally Award; Manwaring Award; Nasoff Award; McLaughlin Award. These awards refer to some, but not all, of plaintiffs' theories of breach of contract. Id. They also make no mention of plaintiffs' claims for violations of state consumer protection laws. Id. The other five awards address some, but not all, of plaintiffs' state consumer protection law theories. Damato Award; Maraquin Award; Brooks Award, Lenett Award; Yoosefi Award. Moreover, all nine arbitral awards lack a discussion of plaintiffs' breach of duty of good faith and fair dealing claims, and plaintiffs' claims that Time Warner breached the Agreement by imposing the Modem Lease Fee on customers who already owned their own modems.[10] See Arbitration Awards. The record thus lacks any basis for an inference that plaintiffs raised and arbitrators decided all of the same issues raised here.

Moreover, in its motion to dismiss, Time Warner appears to assume that New York law applies to the common law claims asserted by all plaintiffs, see Def.'s Mot. at 14-15, whereas the various arbitral awards assess plaintiffs' common law claims under the law of three states — New

---

[10] Presumably, the arbitrators did not address plaintiffs' argument that Time Warner breached the Agreement by charging the Fee to customers who owned their own modems because none of the named plaintiffs in fact owned his or her own modem. See Def.'s Mot. at 10 n.9. Time Warner now argues that this claim should be dismissed because no plaintiff has "standing" to bring it, but its argument is premature and should instead be made in the context of a challenge to class certification.

The Second Circuit recently clarified "'tension' in [the] case law as to whether 'variation' between (1) a named plaintiff's claims and (2) the claims of putative class members 'is a matter of Article III standing or whether it goes to the propriety of class certification pursuant to Federal Rule of Civil Procedure 23(a).'" NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 160 (2d Cir. 2012) (alterations omitted) (quoting Gratz v. Bollinger, 539 U.S. 244, 263 & n.15 (2003)). In NECA-IBEW, the court surveyed recent Supreme Court precedent and concluded that "in a putative class action, a plaintiff has class standing if he plausibly alleges (1) that he 'personally has suffered some actual . . . injury as a result of the putatively illegal conduct of the defendant,' and (2) that such conduct implicates 'the same set of concerns' as the conduct alleged to have caused injury to other members of the putative class by the same defendants." Id. at 162 (quoting Blum v. Yaretsky, 457 U.S. 991, 999 (1982); Gratz, 539 U.S. at 267). This "two-part test, which derives from constitutional standing principles, is . . . distinct from the criteria that govern whether a named plaintiff is an adequate class representative under Rule 23(a)." Ret. Bd. of the Policemen's Annuity & Ben. Fund v. Bank of N.Y. Mellon, 775 F.3d 154, 161 (2d Cir. 2014).

Plaintiffs easily meet both parts of the two-part test for standing. First, each plaintiff alleges that he or she "personally suffered some actual injury as a result of the putatively illegal conduct" by Time Warner. NECA-IBEW, 693 F.3d at 162. Second, the named plaintiffs were subject to the exact same "conduct alleged to have caused injury to other members of the putative class," id.: they accessed Time Warner's internet service through modems they received from Time Warner before the Fee was imposed; the other putative class plaintiffs accessed Time Warner's internet service through modems that they purchased themselves. Thus, plaintiffs have standing to bring this claim. Time Warner may raise the issue again at the class certification stage.

York, New Jersey, and California. Time Warner's failure even to address choice of law issues leaves unresolved the question of whether the substantive law governing plaintiffs' claims here differs from the legal principles applied in arbitration. If the substantive law governing this lawsuit and the prior arbitrations differs in a material respect, the issues raised and decided in arbitration would not be "identical" to the issues before this court, and the doctrine of collateral would not apply. 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4417 (2d ed. 2016) ("[F]or purposes of preclusion, 'issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits be the same.'" (quoting Peterson v. Clark Leasing Corp., 451 F.2d 1291, 1292 (9th Cir. 1971))).

In sum, without a more complete record before me, I cannot determine the precise factual and legal issues raised and necessarily decided in the arbitrations of each plaintiff, which in turn determine whether collateral estoppel bars their claims in court. See Tracy v. Freshwater, 623 F.3d 90, 100 (2d Cir. 2010) (remanding case because the court was "not presented with the full record from [the prior] proceedings and [was] thus constrained in [its] efforts to determine what [issues] were fairly litigated and necessarily decided in that action"); cf. Sassower v. Abrams, 833 F. Supp. 253, 264 (S.D.N.Y. 1993) (deciding collateral estoppel at motion to dismiss stage because "the Court ha[d] all the necessary data and legal records before it"). I therefore deny Time Warner's motion to dismiss on this ground, without prejudice to renewal at an appropriate stage of the proceeding. See Davis v. Proud, 2 F. Supp. 3d 460, 482 (E.D.N.Y. 2014) ("The complaint and exhibits attached thereto are devoid of any indication that the issues . . . were ever raised in the . . . [prior] proceedings or necessarily decided. . . . [D]efendant's motion seeking dismissal of plaintiff's claims as barred by the doctrine of issue preclusion is denied without prejudice to renewal upon a motion for summary judgment.").[11]

C. Plaintiffs Who Prevailed in Arbitration or Commenced No Arbitral Proceedings Are Not Subject to Collateral Estoppel and May Proceed with Their Equitable Claims.

As Time Warner acknowledges, the plaintiffs who prevailed in arbitration on their breach of contract claims for damages (Manwaring and McLaughlin) are not barred by collateral estoppel from seeking equitable relief on those claims. See Def.'s Reply at 15 n.9.

The new plaintiff, Angel Nieves, may also pursue his equitable claims in this court. In an effort to bar Nieves' claims from court, Time Warner does not invoke a preclusion doctrine. Instead, it peremptorily asserts that because Nieves' injunctive claims "present the potential for award of money damages . . . [they] should be resolved in the first instance by an arbitrator." Def.'s Mot. at 1 n.2. The argument fails, as it is unsupported by legal authority and stretches far beyond any permissible bounds the language of the parties' arbitration agreement. That Agreement imposes on the parties an obligation concerning the forum in which they may seek various remedies. Specifically, it mandates that money damages may be sought only in arbitration and equitable relief may be sought only in court. Agreement ¶ 15(b). Nothing in the arbitration agreement, however, can be read to support the proposition that either forum takes temporal

[11] Plaintiffs contend that collateral estoppel cannot bar their equitable claims because they were prohibited from seeking equitable relief in arbitration. See Pls.' Opp'n at 16-17. As Time Warner notes, however, the underpinning of this argument is flawed. As addressed in detail above, see supra at 10-12, it is true that the doctrine of res judicata may not apply to claims for relief that was not available in a prior proceeding. But there is no such limitation on the doctrine of collateral estoppel. Where the factual and legal issues underlying the claims in a prior proceeding, which were necessary and decided by a final judgment in that matter, are identical to the issues underlying the claims in a subsequent proceeding, collateral estoppel may bar relitigation of the issues regardless of whether the relief sought in the two proceedings is, or could have been, the same. See 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4416 (2d ed. 2016) ("Issue preclusion . . . is available whether or not the second action involves a new claim or cause of action."); see also Norris v. Grosvenor Mktg. Ltd., 803 F.2d 1281, 1286 (2d Cir. 1986). Plaintiffs should carefully consider this distinction in future proceedings.

precedence over the other. Similarly to all the other plaintiffs in this action, plaintiff Nieves now seeks only declaratory and injunctive relief and restitution; he does not bring a claim for money damages. See Pls.' Opp'n at 4. The Agreement's arbitration clause does not condition his right to sue for equitable relief on a prior arbitration for money damages. It directs only that his equitable claims be brought in court, and this is precisely what Nieves has done.[12]

II. There Is No Bar to Plaintiffs' Claims for Injunctive Relief.

All plaintiffs seek a permanent injunction on all claims. Am. Compl. ¶¶ 87-90, 101, 107, 116, 124, 131, 139. "To prevail on a motion for a permanent injunction, a plaintiff must both succeed on the merits and demonstrate the 'absence of an adequate remedy at law and irreparable harm if the relief is not granted.'" Davis v. Shah, 821 F.3d 231, 243 (2d Cir. 2016) (quoting Roach v. Morse, 440 F.3d 53, 56 (2d Cir. 2006)).[13] Insofar as Time Warner argues that plaintiffs cannot succeed on the merits because their equitable claims are precluded, see Def.'s Mot. at 16, this argument fails because, as explained in detail above, a merits determination of the plaintiffs' equitable claims has not been foreclosed.

---

[12] Nor does collateral estoppel bar the putative class plaintiffs from bringing their equitable claims on behalf of the class in this court. See William B. Rubenstein, Newberg on Class Actions § 18:13 (5th ed. 2016) ("[I]t is rare that a defendant can ever take advantage of a prior judgment in its favor against the class. This is so because preclusion can never be run against a party that has not yet had its day in court. . . . [I]t is rare that a class in a class action has already litigated an issue to a judgment such that the defendant could argue that the class has had a full and fair opportunity to be heard and may be precluded from re-litigating a particular issue.").

Unless plaintiffs substitute additional class representatives, however, collateral estoppel — should it be found applicable to individual plaintiff's claims — could potentially pose a bar to class certification. See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 59 (2d Cir. 2000) ("[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation.") (quoting Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir.1990)); Monaco v. Hogan, No. 98-cv-3386, 2002 WL 32984617, at *42 (E.D.N.Y. Dec. 20, 2002) (finding class representative atypical because he had previously litigated and lost an issue that "appear[ed] to be central to the success of his claims" but there was "no evidence upon which to conclude that issue preclusion [would] be raised as a defense against the claims of many members of the class"); see also Stender v. Archstone-Smith Operating Tr., No. 07-cv-02503, 2015 WL 5675304, at *5-8 (D. Colo. Sept. 28, 2015) (considering whether collateral estoppel effect of prior arbitration award in favor of defendant against named plaintiff provides a unique defense that prevents class certification).

[13] As plaintiffs note, their statutory consumer protection claims do not require this showing. See Pls.' Opp'n at 29-30; Barkley v. United Homes, LLC, 848 F. Supp. 2d 248, 273 (E.D.N.Y. 2012), aff'd sub nom. Barkley v. Olympia Mortg. Co., 557 F. App'x 22 (2d Cir. 2014). Because Time Warner makes no argument that plaintiffs have failed to plead the statutory requirements for their consumer protection claims, see Def.'s

Time Warner also argues that I should dismiss plaintiffs' claims for injunctive relief because plaintiffs "cannot demonstrate irreparable harm or lack of an adequate remedy at law." Def.'s Mot. at 16. This argument is unpersuasive. A damages remedy is inadequate where, as here, plaintiffs are injured by a continuing violation of the law. Were the damages remedy in arbitration the only remedy available, "plaintiffs 'would be required to pursue damages each time they were injured.'" Blue Sky Entm't, Inc. v. Town of Gardiner, 711 F. Supp. 678, 697 (N.D.N.Y. 1989) (alterations omitted) (quoting Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2944 (1973)). Repeatedly seeking damages in arbitration is onerous; it is not an adequate remedy for a continuing violation. See Aguilar v. Immigration & Customs Enf't Div. of the U.S. Dep't of Homeland Sec., 811 F. Supp. 2d 803, 829 (S.D.N.Y. 2011) (explaining that a damages remedy for past violations is not adequate to remedy ongoing violations); Martin v. Shell Oil Co., 180 F. Supp. 2d 313, 323 (D. Conn. 2002) ("Harm of a continuing nature can justify a permanent injunction . . . even if there is some basis for calculating pecuniary damages.").

Here, the plaintiffs have pled factual allegations supporting the inference that Time Warner continues to impose the Fee on customers' monthly bills. See, e.g., Am. Compl. ¶ 52 ("TWC continues to bill consumers to lease their modems."). This factual allegation forms the basis of plaintiffs' claim for injunctive relief: plaintiffs seek an injunction to stop Time Warner from continuing to charge the Fee in violation of its contractual, quasi-contractual, and statutory

---

Mot. at 12-13, and in light of the rejection of Time Warner's collateral estoppel arguments, Time Warner's motion to dismiss plaintiffs' claims for injunctive relief under those statutes is denied.

obligations. Id. ¶¶ 12(c), 14, 15, 17, 88, 90. Plaintiffs have alleged that they are being harmed by Time Warner's continuing violation of the law — and this is the type of violation for which an injunction is an appropriate and necessary remedy. See Sec. & Exch. Comm'n v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100 (2d Cir. 1972) ("The critical question for a district court in deciding whether to issue a permanent injunction . . . is whether there is a reasonable likelihood that the wrong will be repeated."); cf. TechnoMarine SA v. Giftports, Inc., 758 F.3d 493, 504 (2d Cir. 2014) ("A district court may deny injunctive relief . . . when there is little evidence of likelihood of future violations."). Indeed, even plaintiffs who prevailed in arbitration, such as plaintiffs Manwaring and McLaughlin, may be charged the Fee each month in perpetuity absent injunctive relief. Thus, contrary to what Time Warner asserts, see Def.'s Mot. at 17, plaintiffs do not have an adequate remedy at law.

Because plaintiffs have plausibly alleged facts supporting an inference that Time Warner's violation is ongoing, they have met their burden at the motion to dismiss stage to pursue injunctive relief. See Aguilar, 811 F. Supp. 2d at 828-29 ("[T]he plaintiffs have adequately alleged that they will be irreparably harmed if an injunction does not issue. . . . The plaintiffs have adequately pleaded facts that would support the grant o[f] an injunction."); Archibald v. Marshalls of MA, Inc., No. 09-cv-2323, 2009 WL 3817404, at *4 (S.D.N.Y. Nov. 12, 2009) (declining to strike plaintiffs' claims for injunctive relief when plaintiffs alleged that "wrongful conduct is continuing" and explaining that "a money judgment will not provide adequate relief to the class . . . and an injunction may be an appropriate remedy"); Cmty. Programs of Westchester of Jewish Cmty. Servs. v. City of Mount Vernon, No. 06-cv-3332, 2007 WL 2981915, at *6 n.5 (S.D.N.Y. Oct. 9, 2007) ("[B]ased upon the Court's conclusion that plaintiff's . . . claims are viable at this stage of litigation, it would be premature to dismiss plaintiff's prayer for injunctive relief.").

The only other argument Time Warner raises in support of its motion to dismiss plaintiffs' claims for injunctive relief is that, in January 2014, it "modified [the Agreement] to expressly allow TWC to charge customers a monthly fee to lease an internet modem." See Def.'s Mot. at 18. This argument fails, however, because I may not consider any such modifications at this stage. "In considering a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference." Kramer, 937 F.2d at 773. In this case, the Agreement attached to the complaint is dated February 12, 2013. The same version of the Agreement, with the same date, is attached to the arbitral awards, which I may also consider on this motion. See Agreement, Decl. of Peter J. Linken Ex. 9, Dkt. #41-3. The 2014 amendment to the Agreement is not referenced in the complaint and is not among the documents that I may consider on this motion. Indeed, it is referenced solely in Time Warner's Memorandum of Law. See Def.'s Mot. at 6. This amendment thus provides no cognizable basis on which to dismiss plaintiffs' claims for injunctive relief.

III. The Motion to Dismiss Plaintiffs' Request for a Declaratory Judgment Is Denied at This Time.

All plaintiffs seek declaratory relief. Am. Compl. ¶¶ 82-86, 101, 107, 116, 124, 131. Time Warner argues that I should decline to exercise jurisdiction over plaintiffs' claims for a declaratory judgment because adjudicating them would serve no useful purpose in this litigation. See Def.'s Mot. at 6-9.

The Declaratory Judgment Act (DJA) permits a federal court to exercise jurisdiction over a claim for a declaratory judgment.[14] The jurisdiction provided by the DJA over declaratory claims

[14] "The DJA is 'procedural only' and 'does not create an independent cause of action.'" Chevron Corp. v. Naranjo, 667 F.3d 232, 244 (2d Cir. 2012) (quoting Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950); Davis v. United States, 499 F.3d 590, 594 (6th Cir. 2007)). A federal court must

is "permissive": district courts may exercise jurisdiction, but also have "broad . . . discretion . . . to refuse to exercise jurisdiction over a declaratory action that they would otherwise be empowered to hear." Dow Jones & Co. v. Harrods Ltd., 346 F.3d 357, 359 (2d Cir. 2003). In considering whether to exercise jurisdiction over a claim for a declaratory judgment, the Second Circuit has put forward two factors that I must consider, as well as three additional factors that I may consider:

> [The] simple test . . . asks (1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty. . . . [A court may] ask also (1) whether the proposed remedy is being used merely for 'procedural fencing' or a 'race to res judicata'; (2) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and (3) whether there is a better or more effective remedy.

Id. at 359-60 (citations omitted). In evaluating these factors, I must "consider[] 'the litigation situation as a whole.'" Gianni Sport Ltd. v. Metallica, No. 00-cv-0937, 2000 WL 1773511, at *4 (S.D.N.Y. Dec. 4, 2000) (quoting Great Am. Ins. Co. v. Houston Gen. Ins. Co., 735 F. Supp. 581, 585 (S.D.N.Y. 1990)).

Time Warner argues that a declaratory judgment would be "duplicative" and serve no useful purpose because plaintiffs have pursued or could pursue claims for damages in arbitration under the same causes of action. See Def.'s Mot. at 7-8. To support its position, Time Warner cites to cases where declaratory judgment claims were dismissed as duplicative of claims for damages. See id. at 7 (citing, e.g., Fossil Indus., Inc. v. Arjo Wiggins, USA, Inc., No. 12-cv-2497, 2015 WL 5356453, at *17 (E.D.N.Y. Sept. 12, 2015)). But in all cited cases, the damages and declaratory claims were advanced in the same action. Here, by contrast, the Agreement's arbitration clause

---

independently have subject matter jurisdiction over the underlying claims. This jurisdiction may derive from the Class Action Fairness Act, as it does here. See, e.g., S. Florida Wellness, Inc. v. Allstate Ins. Co., 745 F.3d 1312, 1316 (11th Cir. 2014).

requires plaintiffs to raise their declaratory judgment claims in a forum different from the one that adjudicated their damages claims. As described in detail above, I cannot now determine whether the equitable claims plaintiffs bring in this court in fact duplicate their claims for damages brought in arbitration. See supra at 14-16 (explaining that Time Warner has not shown that plaintiffs' equitable claims are "identical" to claims brought in arbitration). Thus, at this early stage in the litigation, I cannot agree with Time Warner that plaintiffs' declaratory judgment claims are necessarily duplicative of their damages claims, which would eliminate their usefulness.

Moreover, plaintiffs' declaratory judgment claims could ultimately be beneficial in resolving the rights of the parties. This action involves a putative class of millions of Time Warner subscribers, the vast majority of whom have not proceeded to arbitration. Classwide declaratory relief is specifically contemplated by the Federal Rules of Civil Procedure, and the Supreme Court recently remarked that such relief is appropriate when "a single . . . declaratory judgment would provide relief to each member of the class." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011) (citing Fed. R. Civ. P. 23(b)(2)). Here, a declaratory judgment could resolve the rights of the large number of potential plaintiffs. See Pls.' Opp'n at 8-10. As the plaintiffs note, this could work in favor of either party: "[I]f a declaratory judgment is . . . denied, that decision will discourage individual arbitrations and save TWC from arbitrating thousands of individual claims." Id. at 9.

Because I cannot at this time find that either of the Dow Jones mandatory factors — that is, usefulness and relief from uncertainty — are not met, I will exercise jurisdiction over plaintiffs' declaratory judgment claims. Should future developments in the case result in a determination that the mandatory factors are not met, plaintiffs' request for declaratory relief will be denied. Moreover, I am conscious of the Second Circuit's recent admonition that:

> [The] question of whether the district court should . . . exercise[] jurisdiction . . . is distinct from the remedial question of whether the district court should grant declaratory relief on those claims under the Declaratory Judgment Act. Equitable discretion as to whether a declaratory remedy should be granted is best exercised after a fuller record has been developed, and presents different issues than the decision whether to abstain from exercising jurisdiction at all."

Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist., 673 F.3d 84, 106 n.7 (2d Cir. 2012). In sum, on this record I can neither conclude that declaratory relief is prohibited, nor can I assess the additional factors informing my discretionary decision concerning whether the remedy should be granted. I therefore accept jurisdiction to allow plaintiffs' claims for declaratory judgment to move forward so that both parties can develop a fuller record in support of their arguments. Time Warner remains free to argue at a later point that plaintiffs are not entitled to declaratory relief.

In seeking to dispose of plaintiffs' request for a declaratory judgment, Time Warner adds one additional argument. Specifically, it contends that allowing a declaratory judgment claim to proceed in court would "be an end-run around the Subscriber Agreement" and "encroach[] upon the domain of the arbitrators" because a declaratory judgment would allow plaintiffs to "run back to arbitration and compel the award of money damages." Def.'s Reply at 6; see also Def.'s Mot. at 9 (Plaintiffs' "duplicative declaratory judgment claim . . . would be tantamount to a collateral attack on the now-confirmed arbitration awards in TWC's favor."). I disagree with Time Warner's position. Of course, "[t]he obligation to arbitrate contract grievances cannot be avoided by . . . a declaratory judgment." N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 456 F. Supp. 85, 96 (E.D.N.Y. 1978); see also 10B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2758 (4th ed. 2016) ("[A]n action for a declaratory judgment may not be used to bypass arbitration provided for by a contract."). But it is also a "fundamental principle that arbitration is a matter of contract." Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010).

Arbitration "is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995). Here, the parties agreed to submit claims for damages to arbitration, and claims for equitable or similar relief to the court. Time Warner does not dispute that declaratory judgment claims are "equitable or similar relief" under the terms of the agreement. Submitting declaratory judgment claims to a court, therefore, fully comports with the parties' agreement to arbitrate certain claims but not others.[15]

IV. Plaintiffs' Unjust Enrichment Claims May Proceed.

All plaintiffs allege unjust enrichment. Am. Compl. ¶¶ 108-12. Time Warner argues that plaintiffs' unjust enrichment claims should be dismissed because they are barred by a valid contract between the parties that covers the subject matter of the claims. Def.'s Mot. at 14-15. Again, I find that Time Warner's argument is premature. Plaintiffs may plead unjust enrichment in the alternative to breach of contract.

"[T]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Valley Juice Ltd., Inc. v. Evian Waters of France, Inc., 87 F.3d 604, 610 (2d Cir. 1996) (quoting Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 516 N.E.2d 190, 193 (N.Y. 1987)). But under certain circumstances, "[b]oth Federal Rule of Civil Procedure 8[] and the pleading rules of New York State law permit the pleading of contradictory claims alleging both breach of a contract or, in the alternative, a quasi contract." Seiden Assocs., Inc. v. ANC Holdings, Inc., 754 F. Supp.

---

[15] I note that the parties could have agreed to a contract with an arbitration clause that would permit only a narrow set of claims for equitable relief to be cognizable in court, while requiring all damages claims and some equitable claims to be sent to arbitration, see, e.g., Airtel Wireless, LLC v. Montana Elecs. Co., 393 F. Supp. 2d 777, 781 (D. Minn. 2005), but they did not do so here.

37, 39 (S.D.N.Y. 1991). Such alternative pleading is allowed when either (a) "there is a bona fide dispute as to the existence of a contract" or (b) the contract does not clearly "cover the dispute in issue." Icebox-Scoops v. Finanz St. Honore, B.V., 676 F. Supp. 2d 100, 114 (E.D.N.Y.2009) (quoting IIG Capital LLC v. Archipelago, L.L.C., 829 N.Y.S.2d 10, 14 (N.Y. App. Div. 2007)).

Here, the parties do not dispute that the Agreement is an enforceable contract between plaintiffs and defendant, see Def.'s Mot. at 15; Am. Compl. ¶ 93; see also Damato I, 2013 WL 3968765, at *4. Thus, plaintiffs may plead their unjust enrichment claims in the alternative to their breach of contract claims unless "the contract at issue clearly covers the dispute between the parties." In re LIBOR-Based Fin. Instruments Antitrust Litig., 27 F. Supp. 3d 447, 483 (S.D.N.Y. 2014) (emphasis added) (quoting Union Bank, N.A. v. CBS Corp., No. 08-cv-08362, 2009 WL 1675087, at *7 (S.D.N.Y. June 10, 2009)).

Time Warner argues that "the subject matter of Plaintiffs' unjust enrichment claim falls squarely within the parameters of the [Agreement]." Def.'s Mot. at 15.[16] I cannot agree. To be sure, Time Warner is correct that plaintiffs' various theories of unjust enrichment all "focus exclusively on the modem lease fee." Id.; see also Am. Compl. ¶ 110 ("Defendant was enriched at the expense of Plaintiffs and the Class through the collection of the Modem Lease Fee."). But as plaintiffs explain, one reasonable interpretation of the Agreement is that it "does not directly address TWC's decision to charge" the Fee. Pls.' Opp'n at 25. Indeed, four arbitrators rejected plaintiffs' breach of contract claims precisely because they found that the Agreement does not cover the imposition of the Fee. See Maraquin Award at 5; Brooks Award at 7; Lenett Award at 4; Yoosefi Award at 9. Those arbitrators considered the provisions of the Agreement cited by the plaintiffs, found that none of those provisions prohibited Time Warner from imposing the Fee, and concluded that the Agreement "does not address the pricing of TWC . . . equipment." Id.

---

[16] Time Warner argues that Damato I definitively resolved this issue when it stated that "plaintiffs' dispute with TWC relates to the cost of its internet service, which is plainly within the scope of the Subscriber Agreement." Def.'s Reply at 10, 11, 14 n.8 (quoting Damato I, 2013 WL 3968765, at *7). However, this remark was made in the context of an unrelated issue: whether under California law the arbitration clause was "unconscionably broad [because] its scope exceeds reasonable expectations." Damato I, 2013 WL 3968765, at *7. The opinion concluded that a reasonable TWC subscriber would expect this dispute to be covered by the Agreement because it relates to internet service, which was the general subject of the Agreement. Id. Read in context, it is clear that the quoted language resolved only the question of what a reasonable TWC consumer would expect the contract to cover. It did not reach the issue here — specifically, whether the contractual language actually covers the parties' dispute.

Because it is not clear whether the Agreement covers Time Warner's imposition of the Fee, it would be premature to dismiss plaintiffs' unjust enrichment claims at this early stage in the litigation. See MDCM Holdings, Inc. v. Credit Suisse First Boston Corp., 216 F. Supp. 2d 251, 261 (S.D.N.Y. 2002) ("Whether the contracts at issue, in fact, cover the subject matters in controversy has not been determined. . . . [I]t is not appropriate to dismiss the unjust enrichment claim at this time.").

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss plaintiffs' amended complaint pursuant to Rule 12(b)(6) is denied in its entirety.

SO ORDERED.

/s/(ARR)

Allyne R. Ross
United States District Judge

Dated: December 8, 2016
Brooklyn, New York